Supreme Court, U.
FILED
MAY 12 1980
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT
OF THE UNITED STATES

No. ~~79-~~1804

RODOLFO GARCIA-JARAMILLO,

Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FREDERICK HETTER
Member of Bar U.S. Supreme Court
2220 Fifth Avenue
San Diego, California 92101
(714) 239-8185

Attorney for Petitioner

TOPICAL INDEX

PAGE

STATEMENT SHOWING JURISDICTION OF THE COURT ... 2

STATEMENT OF THE FACTS OF THE CASE 2

QUESTIONS PRESENTED 6

ARGUMENTS FOR GRANTING THE WRIT 7

I WHETHER THE HONORABLE COURT OF APPEALS FOR THE NINTH CIRCUIT COMMITTED ERROR IN RUFUSING TO ALLOW PETITIONER TO SUBMIT ADDITIONAL EVIDENCE 7

II WHETHER THE COURT OF APPEALS FOR THE NINTH CIRCUIT COMMITTED ERROR IN NOT EXCLUDING THE TESTIMONY OF MS. ALMENGOR AND MS. OCHOA ON THE GROUND THAT SAID TESTIMONY WAS EXECUTED UNDER FORCE, DURESS AND/OR COERCION 9

III WHETHER THE HEARING CONDUCTED AT THE TRIAL LEVEL SATISFIES DUE PROCESS OF LAW 11

CONCLUSION 16

APPENDICES

APPENDIX "A" 17

APPENDIX "B" 23

APPENDIX "C" 24

APPENDIX "D" 25

TABLE OF AUTHORITIES

Case	Page
Bong Youn Choy v. Barber	
279 F. 2d 642 (9th Cir. 1960)	11
Jachero-Cuzco	
File A22-525-878	11, 16
United States of America v. Alberta Lloyd	8
400 F. 2d 414	8
Valeroz v. INS	
387 F. 2d 921 (7th Cir. 1967)	11
Whetstone v. INS	
561 F.2d 1303, 1306 (9th Cir. (1977)	7
Wong Yang v. McGrath	
339 U.S. 33	12
Woody v. INS	
385 U.S. 276	7

11 11, 16

Codes	Page
28 U.S.C. 1254	2, 5
28 U.S.C. 2106	2, 5, 9, 12
28 U.S.C. 2347	9

Rules	Page
8-CFR-242.14(e)	13
8-CFR-292.5(b)	14

IN THE SUPREME COURT
OF THE UNITED STATES

No. _____

RODOLFO GARCIA-JARAMILLO,

Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Rodolfo J. Garcia, respectfully prays that a writ of certiorari issue to review the Opinion dated September 24, 1979, Order dated January 2, 1980, and Order dated February 13, 1980, of the United States Court of Appeals for the Ninth Circuit entered in C.A. No. 78-3347.

STATEMENT SHOWING JURISDICTION OF THE COURT

The latest order of the Court of Appeals for the Ninth Circuit was entered on February 13, 1980. This petition for certiorari was filed within ninety (90) days of that date. The Honorable Court's jurisdiction is invoked under 28 U.S.C. 1254(1). Jurisdiction of this Court pursuant to 28 U.S.C. 2106 is also invoked for the issuance of an order remanding the case to the lower court for further proceedings so petitioner can submit additional evidence in support of his contentions.

STATEMENT OF THE FACTS OF THE CASE

1. Rodolfo Garcia-Jaramillo is a resident alien, a native and citizen of Mexico.

2. On March 27, 1973, petitioner married Maria Yolanda Almengor, a United States citizen.

3. By virtue of said marriage petitioner was able to obtain an immigrant visa and was admitted into the United States as an immigrant, as spouse of a United States citizen, on August 3, 1973.

4. That after petitioner entered the United States as an immigrant, petitioner joined his wife at El Paso, Texas, where they lived as husband and wife.

5. That due to economic reasons petitioner moved to San Francisco, California, and then to San Diego, California.

6. That during this period petitioner was attempting to persuade his wife, Maria Yolanda Almengor, to join him in San Diego; notwithstanding these several attempts made by the petitioner, his wife refused to join him. Whence he sought dissolution of said marriage and on February 26, 1976, the Superior Court of the State of California in the County of San Diego granted a dissolution of their marriage.

7. The duration of said marriage was two (2) years and eleven (11) months, id est: date of marriage, March 27, 1973, to the date of final dissoulution, February 26, 1976, it is two years and seven months after the petitioner entered the United States on August 3, 1973, to the date of final dissolution, February 26, 1976.

8. That the Immigration and Naturalization Service (hereinafter referred to as "Service") conducted investigations and on October 28, 1976, an Order to Show Cause was issued by the San Diego District Director charging the petitioner with three (3) different violations of Section241(a)(1) of the INS Act (8 U.S.C. 1251(a)(1):

(a) §212(a)(14) [8U.S.C. 1182(a)(14)] no labor certification;

(b) §212(a)(19) [8 U.S.C. 1182(a)(14)], procurement of visa through fraud or willful misrepresentation of a material fact; and

(c) §212(a)(20) [8 U.S.C. (a)(20)], entry without a valid immigrant visa.

9. That on May 17, 1977, after several hearings conducted both at El Paso and San Diego, the Service

found petitioner deportable on all counts and issued the Order of Deportation.

10. That petitioner appealed from said Order to the Board of Immigration Appeals and on May 30, 1978, the Board of Immigration Appeals issued its Order affirming the finding of the Immigration Judge.

11. Petitioner filed Petition for Review pursuant to 8 U.S.C. 1105(a) to the Court of Appeals for the Ninth Circuit and on September 24, 1979, the Court entered its opinion rejecting the arguments raised by the petitioner. The only concession given by the Court was: if there was any error, said error was harmless and not prejudicial.

12. Petitioner requesting a rehearing in banc. The Court denied by its Order entered January 2, 1980.

13. Petitioner filed a petition pursuant to 28 U.S.C. 2347 (c) before the Court of Appeals seeking an order allowing petitioner to submit additional evidence. This petition was significant because petitioner sought to present sworn statements of Maria Yolanda Almengor (former wife of petitioner), Rosalina Ochoa (roommate of M. Almengor), and Luis Medrano (witness the Service prevented from testifying). Said petition is very important because these witnesses were the same witnesses utilized by the Immigration Judge in reaching the deportation order. This petition to submit additional evidence was denied by the Court on February 13, 1980.

14. On March 6, 1980, the Service arrested the petitioner. On the same date the undersigned sent to this Honorable Court the petitioner's Manifestation of Intention to file

Petition for Review. Copy of this manifestation was served personally on March 6, 1980, at 1:15 P.M. on Mr. Ritchie (officer in charge at the Service).

15. On March 7, 1980, the Service, notwithstanding the notice served on them that petitioner will file Petition of Certiorari, and in their effort to cover upon Mr. Labato's (Service investigator in El Paso, Texas) mistakes and misdeeds, deported petitioner. These errors and misdeeds of Mr. Labato are shown in the sworn statements sought to be presented by the petitioner before the Court of Appeals.

16. That on April 24, 1980, the petitioner filed with the Service an application for petitioner's reentry to prosecute the foregoing Petition for Certiorari and to question the legality of his deportation.

17. This Petition for Certiorari is based on 28 U.S.C. 1254(1) and 28 U.S.C. 2106.

QUESTIONS PRESENTED

I

WHETHER THE HONORABLE COURT OF APPEALS FOR THE NINTH CIRCUIT COMMITTED ERROR IN REFUSING TO ALLOW PETITIONER TO SUBMIT ADDITIONAL EVIDENCE

II

WHETHER THE HONORABLE COURT OF APPEALS FOR THE NINTH CIRCUIT COMMITTED ERROR IN NOT EXCLUDING THE TESTIMONY OF MS. ALMENGOR AND MS. OCHOA ON THE GROUND THAT SAID TESTIMONY WAS EXECUTED UNDER FORCE, DURESS AND/OR COERCION

III

WHETHER THE HEARING IN THE TRIAL LEVEL VIOLATED DUE PROCESS OF LAW

ARGUMENTS FOR GRANTING THE WRIT

I

WHETHER THE HONORABLE COURT OF APPEALS FOR THE NINTH CIRCUIT COMMITTED ERROR IN REFUSING TO ALLOW PETITIONER TO SUBMIT ADDITIONAL EVIDENCE

1. Petitioner raised the issue of sufficiency of evidence before the Court of Appeals. The Court of Appeals answered by claiming that its function in judicial review is limited to determining whether the findings of the Immigration Judge are supported by reasonable, substantial and probative evidence. The Court cited **Whetstone v. INS,** 561 F.2d 1303, 1306 (9th Cir. 1977) and **Woody v. INS,** 385 U.S. 276. Petitioner believes that the decision in this case violates the holding of this Honorable Court in **Woody, supra.** Mr. Justice Stewart held:

> "That no order for deportation of resident alien may be entered, regardless of length of time that alient has resided in United States, unless it is found by **clear, unequivocal and convincing** evidence that facts alleged as grounds for deportation are true."

2. Petitioner will now proceed to explain why the opinion in the instant case violates the holding in **Woody,**

supra. The Immigration Judge based his decision, finding petitioner deportable, solely on sworn statements of Maria Yolanda Almengor (former wife of petitioner) and Rosalia Ochoa (roommate of Ms. Almengor). Petitioner on January 14, 1980, moved the Court of Appeals seeking an order to allow petitioner to adduce additional evidence. The evidence sought to be submitted by petitioner consists of:

(a) Sworn statements of Maria Yolanda Almengor; and

(b) Sworn statements of Rosalia Ochoa.

These two witnesses used by the Service as their prosecution witnesses have executed sworn statements suggesting that they were coerced by the Service Agent or Agents into giving their prior sworn statements. To show good faith on the part of petitioner on the alleged coercion and/or pressure perpetrated by the Government's Agents, petitioner was willing to deposit the said sworn statements before the Court of Appeals provided there should be sua sponte order enjoining the respondent's agent from interviewing the witnesses prior to the requested hearing. This motion of petitioner was denied by the Court of Appeals on February 13, 1980. Had the Court of Appeals allowed petitioner to adduce additional evidence, petitioner should have been able to show that there was no clear, unequivocal and convincing evidence to support the deportation order, which is required in **Woody** holding.

3. This Honorable Court in the case of **United States of America v. Alberta Lloyd,** 400 F. 2d 414, granted

petition for certiorari. In that case Albert Lloyd was convicted for the possession of and the selling of narcotics. The Government had built its case through the use of an informant, Federal Agent, and two policemen. Attorney for defendant requested that the identity of the informant be disclosed, contending that the informant's testimony would be relevant and helpful to his client's defense. The Government objected on the ground of privilege. This Honorable Court ordered a remand to determine if the question of whether the disclosure of the informant's identity would have been relevant and helpful in the defense of the accused. In this case at bar, petitioner is not only trying to show the relevancy of the testimony of Ms. Almengor and Ms. Ochoa, but petitioner is trying to establish by clear, unequivocal and convincing evidence that the prior sworn statements of the Service's witnesses were executed by force, duress and/or coercion. Petitioner had invoked provisions of 28 U.S.C. 2347 (c) as the authorities of the Court of Appeals to remand the case. Petitioner complied with the elements of the law by showing:

(a) the materiality of the evidence sought to be introduced. The sworn statements of Ms. Almengor and Ms. Ochoa were material because they were the very witnesses utilized by the Court in reaching its decision; and

(b) This evidence was unavailable during the final level because of pressure and/or coercion by the Government Agents.

Notwithstanding the compliance of the petitioner the Court of Appeals disposed of the petitioner's motion by:

"ORDER:

The Petition Directing Respondent to Receive Petitioner's Additional Evidence is denied."

4. It is respectfully submitted that substantial justice will be rendered to everyone, especially to the petitioner, if this Honorable Court will issue a remand in this case. Petitioner is invoking 28 U.S.C. 2106 as the authority of this Honorable Court to issue an order for remand.

II

WHETHER THE COURT OF APPEALS FOR THE NINTH CIRCUIT COMMITTED ERROR IN NOT EXCLUDING THE TESTIMONY OF MS. ALMENGOR AND MS. OCHOA ON THE GROUND THAT SAID TESTIMONY WAS EXECUTED UNDER FORCE, DURESS AND/OR COERCION.

1. This issue has been raised with the Court of Appeals but in a different setting. Petitioner before the Court of Appeals objected to the testimony of Ms. Almengor on the ground of privileged communication. To the testimony of Ms. Ochoa, petitioner questioned her credibility.

2. There was a change of circumstances after the Court of Appeals rendered its opinion and its order denying petitioner's petition for re-hearing in banc. This change of circumstances consists of : Ms. Almengor, Ms. Ochoa and Mr. Medrano have executed sworn statements indicating that the Government's Agent or Agents have perpetrated

pressure on the said witnesses and secured inaccurate statements. The Court of Appeals attention was invited on this question when petitioner requested issuance of the order allowing petitioner to adduce additional evidence. The Court of Appeals denied this motion per its order dated February 13, 1980.

3. Petitioner believes that this question of coerced testimony is of first impression to this Court in immigration cases. Petitioner has not found any similar question brought before this Honorable Court. The only case found by petitioner is an unreported case decided by the Board of Immigration Appeals, **In the Matter of Jachero-Cuzco, File A22-525-878.** There is no complete citation because the case has not been designated for publication. In **Jachero-Cuzco, supra,** the alien was apprehended by the Service on December 8, 1977. The Service took the alien's statement on Form I-215B and induced the alien to sign it. During the deportation hearing the alien refused to testify and claimed that said statement was taken under coercion and duress. The Immigration Judge admitted the document and denied the alien's attorney cross-examination of the Service's agent who secured the signature on the document. The Board of Immigration Appeals held:

> "Admission attained by coercion or intimidation may not be the basis of a deportation order. **Bong Youn Choy v. Barber,** 279 F. 2d 642 (9th Cir. 1960). **Valeroz v. INS,** 387 F. 2d 921 (7th Cir. 1967).

4. In this case at bar, although it is not the petitioner who claims coercion, it is the Service's witnesses who were

coerced to support the deportation order against petitioner.

5. For this reason, the authority of this Honorable Court under 28 U.S.C. 2106 should be exercised in order that the coerced testimony be refuted and/or withdrawn and the new sworn statements be admitted as petitioner's additional evidence.

III

WHETHER THE HEARING CONDUCTED AT THE TRIAL LEVEL SATISFIES DUE PROCESS OF LAW

1. This issue was raised before the Court of Appeals. The Court of Appeals found that due process is satisfied if there was a full and fair hearing. The Court cited **Wong Yang v. McGrath,** 339 U.S. 33 as authority.

2. The order of the Immigration Judge dated December 9, 1976, is hereby reproduced because it serves as the basis of petitioner's premise for his argument.

"ORDER OF THE IMMIGRATION JUDGE FOR TAKING OF DEPOSITION

IT APPEARING that the application of Counsel for the respondent to cross-examine Maria Yolanda Almengor, residing at 3200 Indalia Street, El Paso, Texas (Exhibit 6), is timely and not objected to by Counsel for the Service, and

IT FURTHER APPEARING that the witnesses are not reasonably available at San Diego, California, the place of hearing, and that their testimony is essential.

IT IS BY THIS COURT ORDERED that pursuant

to 8 C.F.R. 242.14 (e) after due and proper notice in writing is given to all parties that Maria Yolanda Almengor, Rosalis Ochoa, and Luis Medrano, supra, be presented by the Service before Immigration Judge at El Paso, Texas, for oral direct and cross-examination under oathe concerning material and relevant matters set forth in the record of proceedings, and

IT IS BY THIS COURT FURTHER ORDERED that in the event of the refusal or willful failure of the witnesses within the United States, after due notice, to appear and give testimony, a subpoena shall be promptly issued.

John C. Williams, Immigration Judge"

3. The basis of the authority of the Immigration Judge to issue said order is 8 C.F.R. 242.14(e) which we have quoted in pertinent part:

"8 C.F.R. 242.14(e) provides for the ruling of taking depositions. It provides among other things: 'Such order may prescribe and limit the contents, scope or manner of taking the deposition .... The order of the special inquiry officer to take a deposition shall IDENTIFY the witness .... The officer presiding at the taking of the deposition shall NOTE but not rule upon objection and he shall not comment on the admissibility of evidence or on the credibility and demeanor of the witness.' "

4. One of those witnesses to be deposed as provided in the order quoted in paragraph 2 was Mr. Medrano.

5. The following portion of the transcript of the deposition is quoted.

Pages 198, 199 and 200 of the record provides:

"Judge: . . . . Is Mr. Medrano present and do you intend to present him for cross-examination by Mr. Walker?"

Page 199, line 4 provides:

"Your Honor, he was present a little bit earlier and at the outset of the hearing, I DECLINE TO PRESENT HIM AT THIS TIME. What I would request is that this deposition taking remain open for the short period of time in ORDER TO ALLOW me to contact the Trial Attorney in San Diego. Possibly for the presentation of an additional witness, the Investigator MR. LOBATO, whose investigative report contains MR. MEDRANO's testimony.

Judge: I see, then are you prepared to establish that Mr. Medrano would be an adverse witness. That, is the reason for your requesting Investigator Lobato in lieu thereof."

6. Apparently from the above transcript the Trial Attorney for the respondent in El Paso, Texas, conducted a conference with Mr. Medrano prior to the deposition. During this conference Mr. Medrano indicated that he will testify contrary to Investigator's Report. Because of this, the Trial Attorney for the respondent in El Paso, Texas, refused to comply with the order of the San Diego Immigration Judge, which has never been rescinded or modified.

7. Petitioner has a sworn statement of Mr. Medrano executed on November 20, 1979. This sworn statement completely explains the reason why he was not presented by the Service. The Court of Appeals refused to allow petitioner to submit the said sworn statement as additional evidence.

8. In the sworn statement of Mr. Medrano, he claims that Mr. Lobato (INS investigator) presented to him a typewritten statement for his signature. Mr. Medrano refused to sign it because it was a complete lie. This is the reason why the attorney for the Service in El Paso, Texas, refused to present Mr. Medrano.

9. These facts and allegations substantiate the contention of petitioner, that Ms. Almengor and Ms. Ochoaa were also coerced into signing their sworn statements.

10. It is respectfully submitted that the refusal by the respondent to have Mr. Medrano examined is extremely prejudicial to petitioner.

11. The right of petitioner to cross-examine Mr. Medrano is guaranteed by 8 C.F.R. 292.5(b). If Mr. Medrano was allowed to be cross-examined, petitioner could establish a good and proper defense and could have shown to the Court that all of the accusations were untrue. The effective refusal by the Service to permit petitioner to exercise his right to cross-examine Mr. Medrano violates the inherent requirement of the due process of law.

12. Another unusual procedure adopted by the Immigration Judge in the trial level was: the sworn statement of both Ms. Almengor and Ms. Ochoa (Exhibits 4 and 5) was

never identified, nor due execution established at the time it was admitted into evidence. Counsel for petitioner objected to these documents and the Immigration Judge ruled on their admission as evidence prior to the identification and establishment of due execution. The Immigration Judge allowed the attorney for the Service to utilize these sworn statements in cross-examining the petitioner prior to the time and the said sworn statements were admitted into evidence.

13. To cure this gross error in the hearing, the Service should have allowed petitioner to cross-examine Mr. Lobato (Service's Investigator) who used force, duress, deception and coercion in taking these sworn statements.

14. In the matter of **Jachero-Cuzco, supra,** the Board of Immigration Appeals has said:

> "An immigration judge who utilizes a Service investigator to identify statements or records made from statements from a repondent may not refuse the respondent's counsel the right to cross-examine the witness as to the voluntariness of the statements. The right to cross-examine, apart from being a right inherent in due process of law, is equally accorded by the regulations. Indeed, the immigration judge himself is required by 6 C.F.R. 242.16(a) to inform the respondent of this right."

14. It is respectfully submitted that petitioner was not accorded a fair hearing in accordance with due process requirements and therefore the case should be remanded to cure this error.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the opinion and orders of the Ninth Circuit.

Respectfully submitted,
LAW OFFICES OF FREDERICK HETTER

By: FREDRICK HETTER
Attorney for petitioner

APPENDIX "A"

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RODOLFO GARCIA-JARAMILLO,

Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

OPINION

PETITION TO REVIEW A DECISION OF THE U.S. IMMIGRATION & NATURALIZATION SERVICE

Before: Choy and Tang, Circuit Judges and Renfrew,* District Judge.

TANG, Circuit Judge:

Garcia-Jaramillo ("Garcia") seeks review of a BIA decision finding him deportable as an alien excludable at the time of entry, 8 U.S.C. § 1251(a). The BIA affirmed the decision of the immigration judge who found Garcia excludable for (1) wilfully withholding critical information concerning his purported marriage to an American citizen[8 U.S.C. § 1182(a) (19)]; (2) procuring an invalid immediate relative visa by means of a sham marriage [8 U.S.C. § 1182(a) (20)] and (3) entering without a valid labor certificate [8 U.S.C. § 1182(a) (14)]. On appeal Garcia alleges that the evidence was insufficient to prove a sham

marriage; that testimony by his former wife contained privileged communications; and that he was denied a fair and impartial hearing.

FACTS

On March 27, 1973, Garcia, a native and citizen of Mexico, married a native and citizen of the United States. They separated on August 1, 1973, never having resided as man and wife. Garcial was granted an immigrant visa on August 3, 1973 and classified a spouse of a U.S. citizen. The parties were divorced February 26, 1976. On May 17, 1977, after a hearing, an immigration judge ordered Garcia deported on the grounds that his marriage was a sham from its inception and entered into soley for immigration purposes.

DISCUSSION

(1) Sufficiency of Evidence of a Sham Marriage.

Initially, Garcia urges that it is irrelevant whether his marriage was a sham since he and his wife freely entered into a valid, legal marriage in Las Cruces, New Mexico. The argument is frivolous. It is within the authority of the INS to make inquiry into the marriage to the extent necessary to determine if it was entered for the purpose of evading the immigration laws. **Bark v. INS,** 511 F. 2d 1200 (9th Cir. 1975). A marriage is a sham "if the bride and groom did not intend to establish a life together **at the time they were married." Id.** at 1201. Conduct and lifestyle before and after marriage is relevant ot the extent it aids in determining the intent of the parties at the time they were married. **Id.**

In determining the sufficiency of the evidence judicial review is limited to whether the findings of the immigration judge are supported by "reasonable, substantial and probative evidence." **Whetstone v. INS,** 561 F. 2d 1303, 1306 (9th Cir. 1977); 8 U.S.C. §1105(a) (4); **See also Woodby v. INS,** 385 U.S. 276, 282 (1966).

Here, there was substantial evidence that the marriage was a sham. Garcia's former wife testified that Garcia approached her three months before marriage and offered to pay her $200.00 to marry him and help arrange for a resident passport. He told her they would not have to live together and he would later get a divorce. She testified he gave her approximately $150.00 and that she lived with her roommate both before and after her marriage. The testimony of the roommate corroborated her testimony. There is ample evidence to support the findings that Garcia agreed to pay his wife to marry him and to terminate the marriage upon obtaining immigration papers.

Garcia disputes his former wife's testimony. However, the immigration judge discredited Garcia's testimony which is conflicting and incredible. The judge's credibility determination rests on reasonable substantial and probative evidence and this Court will not overturn the evaluation. **Espinoza Ojeda v. INS,** 419 F. 2d 193, 186 (9th Cir. 1969).

(2) Privileged Communications

Garcia asserts his wife was incompetent to testify against him. In **Volianitis v. INS,** 352 F. 2d 766 (9th Cir. 1965), this Circuit ruled that the marital privilege applies

in a deportation proceeding. However, once the parties are divorced, the privilege extends and is limited only to confidential communications during marriage.

Garcia's counsel never raised the marital privilege at the hearing and therefore waived it. Moreover, the incriminating portions of his wife's testimony were not privileged under **Volianitis.** Her testimony at the hearing was after her divorce. She revealed conversations with Garcia that occurred before they married and she told about their sexual conduct after marriage. Neither conversation before marriage nor testimony concerning the existence or lack of sexual relations between former spouses is privileged after divorce. The immigration judge did admit a written statement made by Garcia's wife prior to their divorce which would have been privileged in its entirety. **However, its admission was harmless since the written statement was essentially a summary of her more extensive testimony before the immigration judge** after her divorce and which did not involve confidential communications.

(3) Due Process Arguments

In a deportation hearing, an alien is entitled to the guaranty of due process which is satisfied only by a full and fair hearing. **Wong Yang Sung v. McGarth,** 339 U.S. 33, 49-51 (1950); **Ramirez v. INS,** 550 F. 2d 560, 563 (9th Cir. 1977). Such a hearing is denied only if the thing complained of causes alien to suffer some prejudice. **Nicholas v. INS,** 590 F. 2d 802 (9th Cir. 1979). Garcia raises several issues in his brief which, in sum, question his

having had a full and fair hearing.

Garcia urges that he was denied a fair hearing because testimony was received that he was a homosexual before, during and after his marriage. The record does not support Garcia's allegation that he was asked an inordinate number of questions concerning homosexuality. **Even if we were to assume the testimony was improper, it was not prejudicial.** Aside from such testimony, the immigration judge's finding of a decision to marry solely to evade the immigration laws rests on substantial, provative and reasonable evidence.

Garcia also contends that the failure of the Government to depose two persons, Guiber Lobato and Luis Medrano, was a denial of due process. Lobato was a government investigator who took a written statement from Medrano. The immigration judge afforded no weight to Medrano's statement in making his decision. Garcia could not have been prejudiced by the inability to cross-examine these persons when their testimony was never considered by the immigration judge.

Finally, Garcia's appellate counsel asserts that counsel at the deportation hearings was incompetent since there was failure to protect confidential marital communications and to subpoena Medrano for cross-examination. We have already determined that the former wife's testimony, given after divorce, was not privileged. The written statement before divorce was privileged but its admission was harmless because the evidence was cumulative. The failure to subpoena Medrano was not preju-

dicial since the immigration judge did not rely on Medrano's written statement.

The order of deportation is affirmed.

APPENDIX "B"

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RODOLFO GARCIA-JARAMILLO,

Petitioner,

vs.

IMMIGRATION & NATURALIZATION SERVICE,

Respondent.

ORDER

Before: CHOY and TANG, Circuit Judges, and RENFREW,* District Judge.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

Although the Petition failed to comply with Rule 12 of the Ninth Circuit, the full court has, nevertheless, been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

*Honorable Charles B. Renfrew, United States District Judge for the Northern District of California, sitting by designation.

APPENDIX "C"

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RODOLFO GARCIA-JARAMILLO,

Petitioner,

v.

IMMIGRATION & NATURALIZATION SERVICE,

Respondent.

ORDER

No. 78-3347

Before: CHOY and TANG, Circuit Judges, and RENFREW,* District Judge.

The Petition Directing Respondent to Receive Petitioner's Additional Evidence is denied.

*Honorable Charles B. Renfrew, United States District Judge for the Northern District of California, sitting by designation.

PROOF OF SERVICE

STATE OF CALIFORNIA)
ss.
COUNTY OF RIVERSIDE)

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is 612 N. Bush Street, Santa Ana, California 92701.

On May 10, 1980, I served the within Petition for Writ of Certiorari on the interested parties in said action, by placing a true copy in each of 3 envelopes, with postage thereon fully prepaid, in the United States mail at Santa Ana, California addressed as follows:

WADE McCREE
Solicitor General of
The United States
Department of Justice
Washington, D.C. 20530

MARGARET J. PERRY
Attorney
Department of Justice
Washington, D.C. 20530

JAMES J. O'KEEFE
District Director
Immigration and Naturalization Service
880 Front Street
San Diego, CA 92188

I certify under penalty of perjury that the foregoing is true and correct.

EXECUTED on May 10, 1980, at Santa Ana, California.

Jack Gallagher

Supreme Court, U. S.
FILED
MAY 28 1980
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

No. 79-1804

RODOLFO GARCIA-JARAMILLO,

Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FREDERICK HETTER
Member of the Bar
U.S. Supreme Court
2220 Fifth Avenue
San Diego, CA 92101
(714) 239-8185

JACK GALLAGHER, Printed Briefs (714) 835-6522

INDEX TO APPENDICES

Page

Appendix "E"
Order to Show Cause 4

Appendix "F"
Order of Deportation 6

Appendix "G"
Order or decision of the Board of Immigration Appeals 12

Proof of Service 14

IN THE SUPREME COURT
OF THE UNITED STATES
NO. 79-1804

RODOLFO GARCIA-JARAMILLO,

Petitioner,

vs.

IMMIGRATION AND
NATURALIZATION SERVICE,

Respondent.

SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

COMES NOW petitioner, RODOLFO GARCIA-JARAMILLO, through his attorney, Frederick Hetter, and respectfully submits his Supplement to the Petition For A Writ of Certiorari, filed May 12, 1980.

1. Petitioner inadvertently failed to include certain appendices which petitioner hereby seeks to place before this Court.

2. On page 3, paragraph 8 of the Petition, petitioner

referred to an Order to Show Cause issued by the San Diego District Director. Copy of said Order to Show Cause is now attached as Appendix "E".

3. On page 3, paragraph 9 of the Petition, petitioner referred to an Order of Deportation or decision dated May 17, 1977; copy of said decision is now attached as Appendix "F".

4. On page 4, paragraph 10 of the Petition, petitioner referred to an Order or decision of the Board of Immigration Appeals dated May 30, 1978; copy of said decision is now attached as Appendix "G".

5. On pages 18 to 23 of the Petition, the Opinion of the Court of Appeals for the Ninth Circuit was made as Appendix "A". The same was filed with the Clerk of the Court on September 24, 1979, and received by petitioner on September 26, 1979.

6. On page 24 of the Petition, the Order of the Court of Appeals for the Ninth Circuit was made as Appendix "B". The same was filed with the Clerk of the Court on January 2, 1980, and received by petitioner on January 4, 1980.

7. On page 24 of the Petition, the Order of the Court of Appeals for the Ninth Circuit was made as Appendix "C". The same was filed with the Clerk of the Court on February 13, 1980, and received by petitioner on February 15, 1980.

CONCLUSION

WHEREFORE, it is respectfully prayed that the foregoing Supplement be admitted and made a part of the Petition for a Writ of Certiorari filed on May 12, 1980.

Respectfully submitted,
LAW OFFICES OF FREDERICK HETTER
By: (s) FREDERICK HETTER
Attorneys for Petitioner

APPENDIX "E"

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service
San Diego, California
ORDER TO SHOW CAUSE and NOTICE OF HEARING

In Deportment Proceedings under Section 242 of the Immigration and Nationally Act.

UNITED STATES OF AMERICA)
In the Matter of)
GARCIA-Jaramillo, Rodolfo)
Respondent.)

To: **Rodolfo GARCIA-Jaramillo** File No: **A30 581 018**
3567 Ames Street, San Diego, California 92111

Address (number, street, city, state, and zip code)

UPON inquiry conducted by the Immigration and Naturalization Service, it is alleged that:

(A) 1. You are not a citizen or national of the United States;
(A) 2. You are a native of **Mexico**
and a citizen of **Mexico**
(A) 3. You entered the United States at **El Paso, Texas** on or about **August 3, 1973;**
(date)
(SEE ATTACHED CONTINUATION SHEET)

And on the basis of the foregoing allegations, it is charged that you are subject to deportation pursuant to the following provision(s) of law:

(SEE ATTACHED CONTINUATION SHEET)

WHEREFORE, YOU ARE ORDERED to appear for hearing before a Special Inquiry Officer of the Immigration and Naturalization Service of the United States Department of Justice at **U.S. Immigration Office - Port of Entry, San Ysidro, CA. There is parking to the north of the main** on **November 23, 1976** at **1:00 p.m.**, and

show cause why you should not be deported from the United States on the charge(s) set forth above.
building. **DO NOT ENTER MEXICO.** Please present this notice to the receptionist when appearing for hearing.

Dated: **October 28, 1976**
IMMIGRATION AND NATURALIZATION SERVICE
(s) ARTHUR W. SHANKS
(signature and title of issuing officer)
Arthur W. Shanks, Assistant District Director, Investigations, San Diego
(City and State)

EXHIBIT NO. _____
DEC 8 1976 (s) JM
(Date) ( )

APPENDIX "F"

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

A30 581 018—San Diego, California **May 17, 1977**

In the Matter of)
)
Rodolfo GARCIA-Jaramillo)
Respondent)

IN DEPORTATION PROCEEDINGS

CHARGE: Act of 1952—Section 241(a)(1)—Excludable at Entry under Section 212(a)(14)—No valid labor certification.

Act of 1952—Section 241(a)(1)—Excludable at Entry under Section 212(a)(19)—Procured visa by fraud or by wilfully misrepresenting a material fact.

Act of 1952—Section 241(a)(1)—Excludable at Entry under Section 212(a)(20)—Immigrant—No valid immigrant visa or equivalent entry document.

APPLICATION: Termination of proceedings.

ON BEHALF OF RESPONDENT
Sam J. Cerniglia, Esq.
Ashley, Brady & Cerniglia
530 Broadway, Suite 914
San Diego, Ca. 92101

ON BEHALF OF SERVICE
Harold J. Neubauer, Esq.
Trial Attorney, INS
San Diego, Ca. 92188

DECISION OF THE IMMIGRATION JUDGE

The respondent Garcia is a 28 year old alien, a native and citizen of Mexico who was admitted to the United States for

permanent residence on August 3, 1973 **(Exhibit 2)**. He was in possession of an immigrant visa issued to him earlier the same day by the American Consul at Tiajuana, Mexico. He obtained the visa and was admitted as an immigrant classified IR-1, under Section 201(b) of the act as the "immediate relative" spouse of a citizen of the United States. As an immediate relative he was exempt from the normal numeral restrictions imposed on natives of the Western Hemisphere. In addition, as the spouse of Maria Yolanda Almengor who had been born in this country, he was not required to comply with the labor certification requirement of Section 212 (a)(14) of the Act.

The Service contends, in essence, that respondent procured his immigrant visa as the husband of Almengor by fraud or by wilfully misrepresenting material facts because their marriage was a sham, entered into solely by respondent for immigration purposes. It follows the Service asserts that the respondent is now deporatble under Section 241(a)(1) as an alien excludable at the time of his immigration on August 3, 1973, under Section 212(a)(19) for concealing material information concerning the purported marriage from the Consul because he knew that he would not be issued an immigrant visa if the true facts had been known. The Service maintains that the respondent was coming to this country for the purpose of performing skilled or unskilled labor and was excludable under Section 212 (a)(14) because he was not entitled to the certification waiver of the Secretary of Labor as the spouse of a citizen. Finally, the Service claims that the

immigrant visa issued to the respondent on the basis of material misrepresentations was invalid and consequently the respondent was also excludable under Section 212(a)(20) of the Act for lack of a valid entry document.

During the course of the hearing at which time he was represented by counsel, the respondent, Mr. Donald Smith and Mr. James Burton testified. The record contains various exhibits the Order to Show Cause **(Exhibit 1)**, the Immigrant Visa and Alien Registration **(Exhibit 2)**, documents relating to the termination of respondent's marriage on February 26, 1973 **(Exhibit 3)**, Almengor's statement of August 7, 1975 **(Exhibit 4)**, Ochoa's statement of August 26, 1975 **(Exhibit 5)**, a 2-page Investigative Report dated October 14, 1976 **(Exhibit 6)**, and the deposition testimony of Almengor and Ochoa taken in El Paso, Texas on February 9, 1977 **(Exhibit 7)**. The Investigative Report dated October 14, 1976 which has been marked **Exhibit 6** has been afforded no weight since the person interviewed by INS, Mr. Luis Medrano, was not presented for cross-examination.

While the precise details of all of the events that occurred are uncertain, it is clear that the respondent, born July 6, 1948, in Mexico, married Almengor in Las Cruces, New Mexico on March 27, 1973, while he was temporarily in the United States. Although many of the other facts concerning the event leading up to and following the marriage are in dispute, it has been clearly established that there was an agreement between the parties that Almengor would marry the respondent and

assist him in immigrating in exchange for a payment of $200.00 and a promise that he would later terminate the marriage and pay all of the Court costs. It has been established that the parties never resided together as man and wife, that they did not jointly own any property, that they permanently separated on August 1, 1973 four months and three days after the ceremony, that they parted prior to respondent's immigration, that there has been no reconciliation, that the marriage was dissolved by Court Order on February 26, 1976, and that during all of the critical times Almengor has been a practicing lesbian.

Section 201(b) of the Act provides, in pertinent part, for the preference immigration of spouses of United States citizens. This generous provision permitting an alien spouse of a United States citizen to acquire lawful permanent residence status without regard to the usual limitations, was included in the Act to prevent the separation of families and to preserve the marital unit. House of Representatives Report number 1365, 82nd Congress, Second Session. 1680 (1952). See also **Gonzalez-Portillo**, 13 I&N Dec. 309 (1969).

It is well established that such benefits will not be conferred on the basis of a sham marriage or one that is not viable. **Matter of Lew,** 11 I&N Dec. 148 (DD 1965); **Matter of Kitsalis**, 11 I&N Dec. 613 (BIA 1966); **Matter of Harris**, Int. Dec. 2336 (BIA 1974); and **Matter of Sosa**, Int. Dec. 2469 (BIA 1976).

The critical consideration here, with respect to the bona fides of the marriage, is whether at the time of the ceremony the parties intended to establish a life together.

Bark v. INS, 511 F 2d 1200 (9th Cir. 1975).

Counsel argues that the Service case is based almost exclusively on the testimony and claims of Maria Yolanda Almengor, that her testimony is unreliable and contradictory and that she is not worthy of belief.

While Almengor's testimony relating to events that ocurred some four years ago is occasionally at variance, it is substantially consistent on all the material matters. The marriage was a sham from its inception and was not viable when respondent immigrated on August 3, 1973. Garcia's conduct as evidence at trial clearly falls within the construction of Sections 241(a)(1) and 212(a)(14), 212-(A)(19) and 212(a)(20). The arrangements he made with Almengor to enter into the pretended marriage, the agreement with respect to money, the absence of a meaningful or viable relationship, the permanent separation before his immigration, and the termination of the marriage, taken together establish by evidence which is clear, convincing and unequivocal that the facts alleged for deportation are true. Based on the foregoing it is concluded that respondent is now deportable as charged under Section 241(a)(1), inasmuch as he was excludable when first admitted to the United States on August 3, 1973 under Section 212(a)(14) for lack of a valid labor certification, under Section 212 (a)(19) for wilfully withholding critical information from the Consul concerning the purported marriage, and under Section 212(a)(20) since the visa he presented on the basis of the mala fide marital relationship was invalid.

One other matter deserves comment. In the hearing we have carefully observed the respondent as he testified. We find his testimony by and large incredible. Most difficult to believe when considering the record as a whole, is respondent's claim that Almengor first brought up the subject of marriage, that she wanted to have a baby, that respondent's immigration status was never discussed prior to the marriage, and that Almengor made all of the arrangements to immigrate the respondent without his knowledge.

Finally, the respondent's application for voluntary departure will be denied in the exercise of discretion. Garcia's somewhat less than candid testimony under oath during the hearing, coupled with his limited ties to this country, persuade us that he is not even deserving of this minimal form of relief. Accordingly, the following order will be entered:

ORDER: IT IS ORDERED that the respondent be deported from the United States to Mexico on the charge contained in the Order to Show Cause.

(s)JOHN C. WILLIAMS
Immigration Judge

APPENDIX "G"

(SS)

UNITED STATES DEPARTMENT of JUSTICE
Board of Immigration Appeals
Washington, D.C. 20530

MAY 30, 1978

File: A30 581 018 - El Centro
In re: RODOLFO **GARCIA**-JARAMILLO
IN DEPORTATION PROCEEDINGS
APPEAL
ON BEHALF OF RESPONDENT:
Frederick Hetter, Esquire
2220 Fifth Avenue
San Diego, CA 92101

CHARGE:
Order:
Sec. 241(A)(1), I&N Act (8 U.S.C. 1251(a)(1) - Excludable at entry under section 212(a)(14), 8 U.S.C. 1182(a)(14) - No valid labor certification.

Sec. 241(a)(1), I&N Act (8 U.S.C. 1251(a)(1)) - Excludable at entry under section 212(a)(19), 8 U.S.C. 1182(a)(19) - Procured visa by fraud or by wilfully misrepresenting a material fact.

Sec. 241(a)(1), I&N Act (8 U.S.C. 1251(a)(1)) - Ex-

cludable at entry under section 212(a)(20), 8 U.S.C. 1182(a)(20) - No valid immigrant visa or equivalent entry document.

APPLICATION: Termination
ORDER:

PER CURIAM. We find no merit in the respondent's contentions on appeal. Our review of the record satisfies us that the references to "homosexuality" were not improper and that deportation was established by evidence which is clear, convincing, and unequivocal. We note further that the respondent has not established that he was prejudiced by the Government's failure to make the subject of the investigative report marked "Exhibit 6" available for questioning. The record reflects that this report was not given any evidentiary weight by the immigration judge, and the respondent has not shown that the testimony of this potential witness would have been significant. Moreover, the respondent did not object to the unavailability of this witness, except with respect to the admissibility of the report, until after the immigration judge issued his decision. The decision of the immigration judge is affirmed. The appeal, accordingly, is dismissed.

(s) MARY P. MAGUIRE
Acting Chairman

PROOF OF SERVICE

STATE OF CALIFORNIA)
ss.
COUNTY OF RIVERSIDE)

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is 612 N. Bush Street, Santa Ana, CA 92701.

On May 27, 1980, I served the within Supplement To Petition for Writ of Certiorari on the interested parties in said action, by placing a true copy in each of 3 envelopes, with postage thereon fully prepaid, in the United States mail at Santa Ana, California addressed as follows:

WADE McCREE
Solicitor General of
The United States
Department of Justice
Washington, D.C. 20530

MARGARET J. PERRY
Attorney
Department of Justice
Washington, D.C. 20530

JAMES J. O'KEEFE
District Director
Immigration and Naturalization Service
880 Front Street
San Diego, CA 92188

I certify under penalty of perjury that the foregoing is true and correct.

EXECUTED on May 27, 1980 at Santa Ana, California.

Jack Gallagher

Supreme Court, U. S.
FILED
MAY 30 1980
MICHAEL RODAK, JR., CLERK

No. 79-1804

In the Supreme Court of the United States

OCTOBER TERM, 1979

RODOLFO GARCIA-JARAMILLO, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1804

RODOLFO GARCIA-JARAMILLO, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The petition for a writ of certiorari in this civil case was filed out of time. The judgment of the court of appeals was entered on September 24, 1979 (Pet. App. 18-23), and the order denying rehearing was entered on January 2, 1980 (Pet. App. 24). The time for filing a petition for a writ of certiorari was not extended, and it therefore expired on April 1, 1980. 28 U.S.C. 2101(c).[1] The petition

---

[1]On February 4, 1980, one month after the court of appeals had denied his petition for rehearing, petitioner filed a "Petition Directing Respondent to Receive Petitioner's Additional Evidence." The court of appeals denied this petition without comment on February 13, 1980 (Pet. App. 25). The time to seek certiorari, however, runs from the date of denial of a timely petition for rehearing and is not tolled by the filing of other motions that do not lead to an alteration of the court of appeals' judgment. See R. Stern & E. Gressman, *Supreme Court Practice* 395-403 (5th ed. 1978).

was filed on May 12, 1980. The time limits of Section 2101(c) are jurisdictional. *Department of Banking* v. *Pink*, 317 U.S. 264 (1942).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

MAY 1980

DOJ-1980-05

Supreme Court, U. S.
FILED
JUN 17 1980
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES
NO. 79-1804

RODOLFO GARCIA-JARAMILLO,

Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

ON PETITON FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ANSWER TO MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

FREDERICK HETTER
Member of the Bar
U.S. Supreme Court
2220 Fifth Avenue
San Diego, CA 92101
(714) 239-8185

Attorney for Petitioner

J. GALLAGHER — Printed Briefs (714) 835-6522

INDEX

	Page
Introduction	1
Argument	3
Conclusion	7
Proof Of Service	8

TABLE OF AUTHORITIES

Cases	Page
BOWMAN v. LOPERENA, et al., 311 U.S. 262 (1940)	3
CONTINENTAL OIL CO. v. UNITED STATES 299 U.S. 510	7
DEPARTMENT OF BANKING v. PINK 317 U.S. 264 (1942)	3, 7
LEISHMAN v. ASSOCIATED ELECTRIC CO. 318 U.S. 203	5
ZIMMERMAN v. UNITED STATES 298 U.S. 167	6

Code	Page
28 U.S.C. 2347(c)	5

Rules, Supreme Court	Page
§1, Rule 24	1, 2
§2, Rule 24	2
§5, Rule 24	1, 2

Text	Page
R. STERN and G. GRESSMAN, SUPREME COURT PRACTICE (5th Ed. 1978)	3

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1979
NO. 79-1804

RODOLFO GARCIA-JARAMILLO,

Petitioner

vs.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

ANSWER TO MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

1. Respondent filed its Memorandum in Opposition on May 30, 1980, which was received by petitioner on June 3, 1980.

2. Petitioner is filing the foregoing "Answer to the Memorandum for the Respondent in Opposition" pursuant to Section 5, Rule 24, Rules of the Supreme Court, adopted June 15, 1970.

3. Attention of this Court is respectfully invited to Section 1, Rule 24, Rules of the Supreme Court: the first

pleading which the Respondent is entitled to file is a Brief in Opposition which should be filed within fifty days of receipt of the Petition for Certiorari.

4. The designation made by the Solicitor General was "Memorandum For the Respondent in Opposition." It is very clear that said memorandum was not filed pursuant to Section 1, Rule 24, **supra.** It is not a brief. It is simply a memorandum of points and authorities.

5. Attention of this Court is likewise invited to Section 2, Rule 24, Rules of the Supreme Court, quoted for ready reference:

> "No motion by a respondent to dismiss a petition for writ of certiorari will be received. Objection to the jurisdiction of the court to grant writs of certiorari may be included in briefs in opposition to petition therefor."

6. The "Memorandum for the Respondent in Opposition" cannot be considered as a supplemental brief, filed pursuant to Section 5, Rule 24, because there was no brief in opposition to be supplemented.

7. It cannot be considered as a motion because there is no prayer. Assuming it is a motion for the "sake of argument" it is nonetheless disallowed by Section 2, Rule 24, cited above.

8. Since the memorandum filed by the Respondent is not authorized by the Rules of this Court, the same should be stricken from the record.

ARGUMENT

1. Although the memorandum of the Respondent failed to state its object, it is impliedly asking this Court to dismiss the petition.

2. Respondent cited Department of **Banking v. Pink,** 317 U.S. 264 (1942), and **R. Stern and E. Gressman, Supreme Court Practice,** 395-403 (5th Ed. 1978) as its authority.

3. In **Department of Banking v. Pink, supra,** the issue was: Did the motion to amend its remittitur toll the running of the three month period to file certiorari? The answer from this Court is: No. The case of **Department of Banking, supra,** is readily distinguishable with the present case in that: In **Department of Banking, supra,** the motion sought to amend the order of remittitur; it added statements to the effect that the federal question had been presented and passed upon by the court. In the case at bar, the motion of the petitioner, in which petitioner claimed to have tolled the running of the three month period, was a motion to adduce additional evidence, which purported to show alleged coercion.

4. Petitioner feels his contention is supported in the case **Bowman v. Loperena, et al.,** 311 U.S. 262 (1940) This case was cited on page 399, **R. Stern and G. Gressman, Supreme Court Practice** (5th Ed. 1978), which the Respondent cited in its memorandum.

5. In **Bowman, supra,** the District Court issued and order of adjudication on August 21, 1936. Petitioner filed

a petition for rehearing of an order of adjudication on September 10, 1936. Petitioner filed again a second petition for rehearing on November 15, 1937. On February 17, 1938, the petition for rehearing was denied. Petitioner appealed to the Court of Appeals for the Ninth Circuit on March 18, 1938. Petitioner specifically appealed the order of adjudication of August 21, 1936. The Court of Appeals for the Ninth Circuit dismissed the appeal because: although the appeal was taken within thirty days from the order denying the petition for rehearing, it came too late, because the adjudication was entered, August 21, 1936; the thirty days expired on that date. Petitioner filed a certiorari before this Court on the issue of: whether the filing of the petition for rehearing tolled the running of the thirty day period.

6. This Court has stated in **Bowman, supra,** page 266:

> "Treating the petition of September 10, 1936, and the motion of October 14, 1936, as petitions for rehearing of the order of adjudication, and the petition of November 15, 1937, as a second petition for rehearing filed out of time, the endorsement upon the latter by the judge of the court, and the hearing held and opinion announced upon it, show that it was entertained by the court and dealt with upon its merits. Until the order of February 17, 1938, no final decision was rendered sustaining the adjudication as against the debtor's attack.
>
> These circumstances enlarged the time for taking appeal from the order of adjudication. The filing of an

untimely petition for rehearing which is not entertained or considered on its merits, or a motion for leave to file such a petition out of time, if not acted on or if denied by the trial court, cannot operate to extend the time for appeal. But where the court allows the filing and, after considering the merits, denies the petition, the judgment of the court as originally entered does not become final until such denial, and the time for appeal runs from the date thereof.

We hold that the court below should have entered the appeal.

The judgment is reversed and the cause is remanded to the Circuit Court of Appeals for further proceedings in conformity to this opinion."

7. Petitioner contends that the filing of "Petition Pursuant to 28 U.S.C. 2347 (c) for Leave of Order Directing Respondent to Receive Petitioner's Additional Evidence" to the Court of Appeals on January 14, 1980, can be considered as filing a second motion for rehearing, as mentioned in **Bowman, supra.** The fact that the Court of Appeals accepted and denied it constitiuted enlargement of the period to file certiorari to this Court. Petitioner contends that the ninety day period should start on February 13, 1980, when said petition was denied as per the **Bowman** holding.

8. Petitioner feels that his contention is shared by this Court in the case of **Leishman v. Associated Electric Co.,** 318 U.S. 203. The issue presented before this Court

was: whether petitioner appealed to the Circuit Court of Appeals for the Ninth Circuit within the time provided by law (28 U.S.C. 230).

9. This Court has stated **Leishman, supra,** page 205:

> "In so holding that the court recognize the general rule that where a petition for rehearing, a motion for a new trial, or a motion to vacate, amend, or modify a judgment is seasonably made and entertained, the time for appeal does not begin to run until the disposition of the motion. But this case was differentiated on the ground that the instant motion was not one to amend the judgment but merely one to amend and supplement the findings and conclusions. 128 F. 2d 204. We granted the certiorari to settle the important question of practice presented under the Rules of Civil Procedure.
>
> We think that petitioner's time to appeal did not begin to run until the disposition of his motion under Rule 52 (b) on June 9, 1941, and accordingly that his appeal was timely. The motion was not addressed to mere matters of form but raised questions of substance since it sought reconsideration of certain basic findings of fact and the alterations of the conclusions of the court. In short the necessary effect was to ask that rights already adjudicated be altered. Consequently it deprived the judgment of that finality which is essential to appealability. Cf. **Zimmerman v. United States,** 298 U.S. 167; **Department of Banking v. Pink,** 317 U.S. 264. It is immaterial that petitioner

did not specifically request the amendment of the judgment, and the distinction based on this failure to request by the court below is artificial and untenable. If the motion had been granted and the requested amendment and supplemental findings made, the judgment would have to be amended or altered to conform to those findings and the conclusions resulting from them. We conclude that a motion under Rule 52(b) such as the instant one which seeks to amend or supplement the findings of fact in more than purely formal or mechanical aspects tolls the appeals statute, and that the time for taking an appeal runs from the date of the order disposing of the motion. Cf. **Continental Oil Co. v. United States,** 299 U.S. 510.

The motion was not one for a new trial under Rule 59 and respondent's argument, based on that premise, that it was not filed in time, is not pertinent."

10. Again, petitioner contends that the petition filed by petitioner to the Court of Appeals on January 14, 1980, tolled the running of the ninety day period per the **Leishman** holding.

WHEREFORE, in view of all the arguments and authorities cited, a Writ of Certiorari should be issued to review the opinion and orders of the Ninth Circuit.

Respectfully submitted,
LAW OFFICES OF FREDERICK HETTER

BY: FREDERICK HETTER
Attorney for Petitioner

PROOF OF SERVICE

STATE OF CALIFORNIA)
ss.
COUNTY OF RIVERSIDE)

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is 612 N. Bush St., Santa Ana, California 92701.

On June 17, 1980 I served the within ANSWER TO MEMORANDUM FOR THE RESPONDENT IN OPPOSITION on the interested parties in said action, by placing a true copy in each of 3 sealed envelopes with postage thereon fully prepaid, in the United States mail at Santa Ana, California, addressed as follows:

WADE McCREE
Solicitor General of
The United States
Department of Justice
Washington, D.C. 20530

MARGARET J. PERRY
Attorney
Department of Justice
Washington, D.C. 20530

JAMES J. O'KEEFE
DISTRICT DIRECTOR
Immigration and Naturalization Service
880 Front Street
San Diego, CA 92188

I certify under penalty of perjury that the foregoing is true and correct.

EXECUTED on June 17, 1980 at Santa Ana, California.

Jack Gallagher